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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 525

AMOS COTNEY,

Petitioner,

vs.

STATE OF ALABAMA

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ALABAMA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILLIAM N. McQUEEN,
Attorney General of Alabama;
JOHN O. HARRIS,
Assistant Attorney General of Alabama,
Counsel for Respondent.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I

Opinion of the Court Below

The opinion of the Court of Appeals of Alabama and the opinion of the Supreme Court of Alabama, which are here under consideration, have not been officially reported, but they are published in 26 So. (2d) 598, 603, and 608.

II

Jurisdiction

Petitioner seeks to invoke the jurisdiction of this Court to review the judgment of the Court of Appeals of Alabama, rendered in this cause, and relies upon Section 237 (b) of

the United States Judicial Code as amended on February 13, 1945, 43 Stat. 937 (U. S. C. A., Title 28, Section 344) as giving this Court jurisdiction.

III

Statement of Case

We do not deem it necessary to set forth a full statement of this case. However, we assert that the statement of the case and facts as made by the petitioner is erroneous and misleading in many material respects. We will point out wherein petitioner has misstated the facts.

Factual Misstatements by Petitioner

MISSTATEMENT No. 1

Petitioner charges that there was substantial evidence that another person was shooting at the petitioner immediately before and at the time the fatal shot which killed Adams was fired. The record discloses, except for the testimony of the petitioner himself and that of his wife, that petitioner fired the first shot and that no one else fired at the petitioner until the deceased was shot by the petitioner (R. pp. 5-25).

MISSTATEMENT No. 2

Petitioner charges that the testimony of the widow tended to prove that petitioner maliciously and intentionally shot and killed Adams and that her testimony was in direct contradiction of the great weight of the testimony to the effect that petitioner was being attacked by another person who was firing at him with a pistol or shotgun, and whose attack was being resisted when the deceased, Adams, inadvertently received his fatal wound. The record discloses that petitioner had shot the deceased twice, and had

fired three more shots, before another shot was fired by any one (R. pp. 5-25, 36-49, 62-83, 83-91, 96-104, 129-131).

MISSTATEMENT No. 3

Petitioner charges that he attempted to prove by Dr. Cole (R. pp. 55-59) that he had a conversation with the deceased and that the deceased made a contradictory statement to him while in the hospital. The record discloses that there was never an effort to prove a contradictory statement by the deceased, but that the only statement that petitioner sought to prove was the statement made by the deceased on the way to the hospital and at the hospital, and that these statements were offered as dying declarations only.

MISSTATEMENT No. 4

Petitioner charges that he sought to prove contradictory statements made by decedent Adams to Dr. Moore (R. pp. 59-61). The record discloses that the statement attributed to the decedent by the two doctors, which petitioner sought to prove, was offered only as a dying declaration, and not as a contradiction of decedent's statements.

Proposition of Law

A decision of a state court resting on grounds of state procedure does not present a Federal question.

French v. *Hopkins* (Cal. 1888), 124 U. S. 524, 8 S. Ct. 589, 31 L. Ed. 536;

O'Neil v. *Vermont* (Vt. 1892), 144 U. S. 323, 12 S. Ct. 693, 36 L. Ed. 450;

Tripp v. *Santa Rosa St. R. Co.* (Cal. 1892), 144 U. S. 126, 12 S. Ct. 655, 36 L. Ed. 372;

Thorington v. *Montgomery* (Ala. 1893), 147 U. S. 490, 13 S. Ct. 394, 37 L. Ed. 252;

Loeber v. *Schroeder* (Md. 1893), 149 U. S. 580, 13 S. Ct. 934, 37 L. Ed. 856;

McNulty v. *California* (Cal. 1893), 149 U. S. 645, 13 S. Ct. 959, 37 L. Ed. 882;

Vincent v. *California* (Cal. 1893), 149 U. S. 648, 13 S. Ct. 960, 37 L. Ed. 884;

Wood v. *Brady* (Cal. 1893), 150 U. S. 18, 14 S. Ct. 6, 37 L. Ed. 981;

Northern Pac. R. Co. v. *Patterson* (Mont. 1894), 154 U. S. 130, 14 S. Ct. 977, 38 L. Ed. 934;

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Milkwagon Drivers Union of Chicago, Local 753 v. *Meadowmoor Dairies,* Ill., 312 U. S. 287, 61 S. Ct. 552, 85 L. Ed. 836;

Gasquet v. *Lapeyre, et al.,* 242 U. S. 367.

Argument

THE COURT OF APPEALS AND THE SUPREME COURT OF ALABAMA DID NOT DECIDE A FEDERAL QUESTION OF SUBSTANCE NOT HERETOFORE DETERMINED BY THIS COURT. NEITHER DID THEY DECIDE ANY QUESTION PRESENTED TO THEM IN THIS CASE IN A WAY PROBABLY NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT, BUT FULLY AND FAIRLY DECIDED THE ISSUES SOUGHT HERE TO BE REVIEWED ON AN INDEPENDENT GROUND.

There is nothing in the Fourteenth Amendment guaranteeing due process and equal protection which converts an issue respecting the jurisdiction of a state court under the Constitution and statutes of the state into anything other

than a question of state law and procedure, and a decision by the state court of last resort upon the question of procedure is binding upon this Court. *Gasquet* v. *Lapeyre, supra.*

For these reasons, we believe that this Court does not have jurisdiction in this case and, on such reasons, we respectfully move to dismiss the petition here sought.

WILLIAM N. MCQUEEN,
Attorney General;
JOHN O. HARRIS,
Assistant Attorney General,
Counsel for Respondent.

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MOTION TO DISMISS

Come William N. McQueen, Attorney General of Alabama, and John O. Harris, Assistant Attorney General of Alabama, and move to dismiss the petition for writ of certiorari in this case, and as grounds for such motion assign separately and severally the following:

1. The decisions of the Court of Appeals of Alabama and the Supreme Court of Alabama were rested on a question of state procedure and a Federal question was not necessary or involved to the determination of the cause.

2. The Federal question presented to this Court for decision is not substantial in character.

WILLIAM N. MCQUEEN,
Attorney General;
JOHN O. HARRIS,
Assistant Attorney General,
Counsel for Respondent.